IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

No. 303.

CHARLES E. POPE, Receiver of the Chicago and South Atlantic Railroad Company, *Appellant,* *vs.* LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, *Appellee.*	Appeal from the Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION of APPELLEE to DISMISS APPEAL.

I.

This appeal lies as of right under Clause 3, Section 6, of the Judiciary Act of March 3, 1891.

That provision is as follows:

> "In all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed." (26 U. S. Stats., 828. Sec. 6, Cl. 3.)

The cases in which, thereinbefore in that section (viz:

in clause 1 thereof), the judgment or decree of the Circuit Court of Appeals is made final, are these:

1. In all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; and

2. In all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

It is contended by the appellee, upon this motion to dismiss and in its brief in support thereof, that this is a case in which the jurisdiction is dependent entirely upon the opposite parties to the suit being citizens of different states, within the meaning of clause 1 of section 6, above mentioned. The appellant maintains, on the other hand, that the case in which the judgment or decree in question in this case was rendered is *not* a case in which the jurisdiction is dependent entirely upon the opposite parties thereto being citizens of different states. And that is the question which is involved upon this motion to dismiss.

Is this original bill by the receiver, appointed by Federal courts in other suits, to enforce the right and title acquired by him in and through the Federal courts of his appointment, a suit arising under the Constitution and laws of the United States?

The appellant was appointed receiver of the Chicago & South Atlantic Railroad Company by the Circuit Court of the United States for the Northern District of Illinois, and was thereby directed to take possession of all the real and personal property of said railroad company and all other rights and property whatsoever of said

railroad company within that district, with the usual powers and duties of a receiver. And the order directed that said Chicago & South Atlantic Railroad Company, or whoever might have possession thereof, should assign, transfer and deliver over to such receiver its property, etc. That provision of the order is as follows:

> "And it is further ordered that the defendant, the said Chicago and South Atlantic Railroad Company, or whoever may have possession thereof, do assign, transfer and deliver over to such receiver under the direction of Henry W. Bishop, a master in chancery of this court, all the property, real and personal, wheresoever found in this district, and all contracts for the purchase of land, and all other equitable interests, things in action, and other effects which belonged to or were held in trust for said defendant railroad company, or in which it had any beneficial interest, including the stock books of said railroad company, in the same condition they were at the time of exhibiting the said bill of complaint in this case, except as far as necessarily changed in the proper management of said road, or in which it now has any such interest, and that said defendant, Chicago and South Atlantic Railroad Company, deliver over, in like manner, all books, vouchers, bills, notes and contracts, and other evidences relating thereto, and also the stock books of said railroad company.
>
> "And it is further ordered that the said receiver have full power and authority to inquire after, receive and take possession of all such property, debts, equitable interests, things in action, and other effects, and for that purpose to examine said defendant, its officers and such other persons as he may deem necessary, on oath before said master from time to time."

After the appellant's appointment as receiver as aforesaid, the Circuit Court for the Northern District of Illinois, Judge DRUMMOND presiding, entered its further or-

der in the cause in which appellant was so appointed, giving him express authority to bring suits. That order was entered *nunc pro tunc*, as of the date of his appointment and qualification as receiver, and is as follows:

> "And now comes the receiver, Charles E. Pope, of said Chicago and South Atlantic Railroad Company, and on his application it is ordered and directed that said receiver have full power and authority to bring and prosecute any and all necessary suits for the collection of any claims, choses in action and enforcement of any and every kind and nature, and to defend all suits and actions, touching rights or interests of the property or effects of any kind in his possession or under his control as receiver. This order to be entered now, as of the date of his appointment and qualification as receiver." (Pr. Tr., Vol. II, p. 1,613.)

Shortly after the appellant was appointed receiver, as aforesaid, by the Circuit Court for the Northern District of Illinois, he was also appointed receiver of the Chicago and South Atlantic Railroad Company, by the Circuit Court of the United States for the District of Indiana, and directed to take possession of all real and personal property of the said railroad company, and all other rights and property whatsoever of the said railroad company within that district, with the usual powers and duties of a receiver. And it was further ordered that the defendant railroad company should assign, transfer and deliver over to such receiver all its said property. That provision of the said order is as follows:

> "And it is further ordered that the defendant, the said Chicago and South Atlantic Railroad Company of Illinois and Indiana, or whoever may have possession thereof, do assign, transfer and deliver over to such receiver, under the direction of William P. Fishback, Esq., Master in Chancery of this court, all the property, real and personal, wheresoever

found in this district, and all contracts for the purchase of lands, rights of way, railroad interests, property, railroad franchises, claims for bonds and subscriptions, conveyances thereof or relating thereto, and all other equitable interests, things in action and other effects which belonged to or were held in trust for said defendant railroad company, or in which it had or has any beneficial interest, including the stock books of said railroad company, in the same condition they were in at the time of exhibiting the said bill of complaint in this cause, except as far as necessarily changed in the proper management of said road, or in which it now has any such interest; and that said defendant, Chicago and South Atlantic Railroad Company of Illinois and Indiana, and whoever may have possession thereof, deliver over in like manner all books, vouchers, bills, notes, contracts and other evidences relating thereto, and it is further ordered that the said receiver have full power and authority to enquire after, receive and take possession of all such property, debts, equitable interests, things in action and other effects, for that purpose to examine said defendant, its officers and such other persons as he may deem necessary, on oath before said master, from time to time. It is further ordered and directed that said receiver have full power and authority to bring and prosecute any and all necessary suits for the collection of any claims or choses in action and enforcement of any and all claims and contracts of any and every kind and nature." (Pr. Trans., Vol. I, pp. 340, 18–19.)

The deeds of assignment to the receiver so directed to be made by the said orders appointing appellant receiver, were, after the commencement of this present suit and during its pendency, duly made. (Pr. Rec., Vol. III, pp. 2,279–81.) When so made they related back to and took effect as of the time of the entry of the decretal orders therefor.

Lessee of Wallace v. *Florence*, 1 Wash. R., 503.

Jackson v. *Ramsey*, 3 Cow., 75.
Lundes v. *Brandt*, 10 How., 329, 332.
Welch v. *Dutton*, 79 Ill., 468.
Gibson v. *Choteau*, 13 Wall., 100.

And in the case of an appointment of a receiver in a creditors' suit the equitable title to real interests, as well as the title to personal property and equitable interests passes to the receiver, and in suits in equity by the receiver, no assignment is necessary. The *order* of the court is the effective thing.

Mann, Receiver, v. *Pentz*, 2 Sandf. Ch., 257.
Iddings v. *Bruen*, 4 Sandf. Ch., 417.
Albany City Bank v. *Schermerhorn*, Clarke's R., 298.
Porter v. *Williams*, 5 Seld., 142.
Atty. Gen. v. *Atlas M. L. I. Co.*, 100 N. Y., 282.

The present suit.

After the appointment of the appellant as such receiver as aforesaid by the Circuit Court for the Northern District of Illinois, and by the Circuit Court for the District of Indiana, the appellant, as such receiver, on July 12, 1881, filed this *original bill of complaint* in which the present appeal is pending, in the Circuit Court for the District of Indiana, against persons and corporations who were not parties to or concerned in the suits in which the appellant was so appointed receiver. In this suit, the appellant as such receiver sought to recover, or recover for, certain property and property rights held and claimed by certain of the defendants in this suit, which property and prop-

erty rights, prior to the appellant's appointment as receiver, belonged, as he claimed, to the Chicago and South Atlantic Railroad Company, and *to the ownership of or right to which the appellant receiver succeeded by virtue of his appointment as such receiver, and of the orders of the courts of his appointment, and the proceedings thereunder.* The Chicago and South Atlantic Railroad Company was not made a party to this suit. None of the defendants to this present suit were parties to either of the suits in which the appellant was appointed such receiver. The principal defendants to this present suit were the Indianapolis, Delphi & Chicago Railroad Company, a corporation formed under the laws of the State of Indiana; Morris Sharpe, trustee, who was trustee under a trust deed or mortgage from the Indianapolis, Delphi & Chicago Railroad Company to him; the Chicago & Indianapolis Air Line Railway Company which was formed by the consolidation of a corporation of Indiana and a corporation of Illinois, and the Louisville, New Albany & Chicago Railroad Company, a corporation of the State of Indiana. After this suit was commenced and process served upon said defendants thereto and pending this suit in the Circuit Court, the two defendants, the Chicago & Indianapolis Air Line Railway Company and the Louisville, New Albany & Chicago Railroad Company, entered into articles of consolidation under the name of the Louisville, New Albany & Chicago Railway Company, which is the present appellee, and which was the sole appellant on whose appeal the judgment and decree of the Circuit Court of Appeals here complained of was rendered. None of the issues in this case were involved in or could be determined by the suits in which appellant was appointed receiver.

In his bill of complaint herein, the appellant alleged his appointment as receiver and the orders of court appointing him receiver and authorizing and directing him to bring suit, and his right and title thereby acquired (Pr. Rec., Vol. 1, pp. 1, 2, 23, 24), and that he had given notice of his appointment as receiver to defendants and demanded the property and effects in question, and that said demand was rejected by them. (*Id.*, 42.) And in amendments to the bill, filed by leave of court, and upon which the decree of the Circuit Court proceeded, it was alleged as follows:

> "And the said defendants, or some of them, sometimes pretend that this court, in the said suit of John B. Pettit, never had any jurisdiction of the subject-matter of the said controversy, or of the person of the said Chicago & South Atlantic Railroad Company, to appoint your orator, as receiver as aforesaid, and that your orator as such receiver was never given any power, by the order appointing him, to sue in his own name for the cause of action in this bill set forth; of all which your orator charges the contrary, and charges and submits that the defendants can not, nor can any or either of them herein, aver or raise the question or attack thus collaterally the validity of the order of this court, in the said suit of John B. Pettit, appointing your orator receiver as aforesaid; and your orator charges and submits that said order is, and is to be here taken as valid, binding and effectual; and that your orator is, by the order of said Circuit Court of the United States, for the Northern District of Illinois, and by the order of this court, authorized and empowered, to bring this suit hereunder, in the manner and form as done." (Pr. Rec., Vol. 1, p. 122.)

This amendment, of course, when filed, relates to and is to be taken as if filed at the time of filing the bill. Complainant therefore showed by his bill of complaint that this case involved a federal question—that his right

herein arose and that this is one arising under the federal laws.

(This amendment was not included in the short transcript filed by appellee on this motion.)

This question of appellant's title as receiver, of the validity of his appointment, and of his authority as receiver to bring and maintain this suit, were live questions in this case, the defendants, by their pleadings and motions to dismiss, stoutly controverting them. (Pr. Tr., Vol. I, pp. 76, 68, 263–5.) These were federal questions. The question was involved and fully argued and determined, whether the order of the Federal Court appointing appellant receiver at the suit of a creditor who had not obtained judgment was void collaterally. This involved the seventh amendment to the constitution.

II.

The jurisdiction in this case was not dependent entirely on diverse citizenship within the meaning of clause 1 of section 6 of the judiciary act of March 3, 1891, making the judgment or decree of the Circuit Court of Appeals final in those cases.

There are two recognized and distinct grounds of jurisdiction of federal courts. Section 2 of Article III. of the Constitution, which confers and defines the judicial powers of the United States, and which Chief Justice MARSHALL in *Cohens* v. *Virginia*, 6 Wheat., 264, 398, calls the "distributive clause," lays down and marks this distinction. The cases to which the judicial power of the United States extends are there laid down and distributed as follows:

"All cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.

"All cases affecting ambassadors, other public ministers and consuls.

"All cases of admiralty and maritime jurisdiction.

"Controversies between two or more states; between a state and citizen of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

It is plain, and it was held by Mr. Justice STORY, speaking for the court, in *Martin* v. *Hunter's Lessee*, 1 Wheat., 304, 333–4, and by Mr. Chief Justice MARSHALL, in the opinion of the court, in *Cohens* v. *Virginia*, 6 Wheat., 264, 378, that there are here in Section 2 of Article III. of the Constitution, *two classes* of cases enumerated between which a distinction is there drawn; those in the first three above paragraphs forming one class, and those in the remaining two paragraphs forming the other class. In *Martin* v. *Hunter's Lessee*, *supra*, it is stated of this provision of the Constitution:

"It will be observed that there are two classes of cases enumerated in the Constitution, between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is, and that the judicial power shall extend to all cases; but in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word 'all' is dropped seemingly *ex industria*. Here the judicial authority is to extend to controversies (not to all controversies) to which the United States shall be a party, etc."

And Mr. Chief Justice MARSHALL, in *Cohens* v. *Virginia*, 6 Wheat., at page 378, marks the same distinction into these two classes of cases as made by the constitution. He says:

> "The 2d section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the union in two classes of cases. In the first their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be an exception, it is to be implied against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more states, between a state and citizens of another state,' 'and between a state and foreign states, citizens or subjects.' If these be the parties it is entirely unimportant what may be the subject of the controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

The "character of the parties," on which jurisdiction in the second class of cases entirely depends, *do not include receivers, or other officers of federal courts.* The jurisdiction of the Circuit Court of this original bill, by a receiver of a federal court, "depends on the character of the cause"; it is a suit arising under the constitution and laws of the United States.

Now Congress, in framing the judiciary acts, must be held to have in mind and have respect to this constitutional line of distinction.

The words "all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states," in clause one, of section 6, of the Judiciary Act of March 3, 1891, must be held to have reference to the above constitutional distinction and classification of the cases of federal jurisdiction. These words are the precise designation of a part of the second class of cases in which the constitution confers judicial powers upon federal courts, and excludes all cases within the first class. That designation excludes all cases arising under the constitution and laws of the United States.

In *Byers* v. *McAuley*, 149 U. S., 608, 618, Mr. Justice BREWER, speaking for the court, said:

> "The jurisdiction of the Federal Courts is a limited one, depending upon either the existence of a federal question or diverse citizenship of the parties."

III.

This suit by the receiver of a federal court is a case arising under the laws of the United States within the meaning of Section 2, of Article III of the constitution, and within the meaning of Clause 1 of Section 6 of the Judiciary Act of March 3, 1891.

The complainant receiver is an *officer of the Federal Court* appointing him. *Stuart* v. *Boulware*, 133 U. S., 78, 81; *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S., 223, 236; *Booth* v. *Clark*, 17 Howard, 322, 331; *Davis* v. *Gray*, 16 Wall., 203, 217–18; *Texas & Pac. Ry.* v. *Cox*, 145 U. S., 393, 601; High, Receivers, Sec.

1. The orders appointing complainant receiver and authorizing him to bring this suit "were entered and all action of the court in the premises taken by virtue of judicial power possessed and exercised under the constitution and laws of the United States." *Texas & Pac. Ry.* v. *Cox*, 145 U. S., 593, 601.

The receiver's title is derived from those orders, and depends thereon.

In *White* v. *Ewing*, 66 Fed. Rep., 2, the Circuit Court of Appeals for the 6th Circuit said:

> "We cannot think, after the decisions of the Supreme Court of the United States in *Railroad Co.* v. *Cox*, 145 U. S., 593, that there is any doubt of the right of the receiver in this cause to bring actions in the Federal Court without regard to the citizenship of the parties thereto, *because his suit, being one maintainable on the authority of an order of the United States Circuit Court, authorizing him to bring it, is one arising under the constitution and laws of the United States*, and is thus manifestly within the jurisdiction of the Circuit Court of the United States, by virtue of the first section of the act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat., 433), provided that the amount in controversy exceeds, exclusive of interest and costs, $2,000."

Section 1 of the act of March 3, 1887, as corrected by the act of August 13, 1888, here referred to (which in this respect is like the act of 1875, under which this suit was brought), provides as follows:

> "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United

> States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming land under grants of different states, or a controversy between citizens of a state and foreign state, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses punishable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offenses punishable by them."

In other words, it was here held, that a suit by a receiver of a federal court was a suit "arising under the constitution and laws of the United States." The Circuit Court of Appeals, however, was in doubt whether the Circuit Court had the power to authorize its receiver, in a general creditor's suit, to sue persons therein for less sums than $2,000, and to enter decrees therefor; and this question was certified to this court and passed upon in *White* v. *Ewing*, 159 U. S., 36, and this court answered the question in the affirmative, and said:

> "But it is insisted * * * that the receiver stands in the shoes of the company, and has no higher rights than the corporation, and having sued for less than the jurisdictional amounts, that as to them the cases must be dismissed.
>
> "This position is entirely correct, so far as the right of the receiver to recover upon the merits is concerned; but it has no bearing whatever upon the question of the jurisdiction of the court to pass upon such merits. The receiver does not take his authority as an ordinary endorsee of the paper, and subject to the disability to sue in the federal court,

> which attaches to such endorsee, *but he takes title by operation of law, and as an instrument of the court which appointed him.* * * * "

That title of the receiver is the basis of this suit here at bar.

The receiver in *White* v. *Ewing* was appointed receiver upon creditors' bill, like that of the case at bar. But Mr. Justice BROWN, delivering the opinion of the court, says upon this question, that "two cases decided by justices of this court are directly in point: *Price* v. *Abbott*, 17 Fed. Rep., 506; *Armstrong* v. *Trautman*, 36 Fed. Rep., 275."

Price, Receiver, v. *Abbott*, 17 Fed. Rep., 506, here ruled to be directly in point, was a suit by the receiver of a national bank. In that case Mr. Justice GRAY held as follows:

> "Being appointed pursuant to an act of Congress to execute duties prescribed by that act, he is, in the execution of those duties, an agent and officer of the United States; and actions brought by him to recover assessments duly laid upon stockholders, and necessary to provide for the payment of the debts of the bank, are suits at common law *brought by an officer of the United States suing under the authority of an act of Congress*, of which this court has concurrent jurisdiction with the district court, without regard to the amount sued for."

And the second case which this court held to be directly in point, of *Armstrong* v. *Trautman*, 36 Fed. Rep., 275, was also a suit by a receiver of a national bank; and Mr. Justice JACKSON said of the question of the jurisdiction of the Circuit Court of such a suit:

> "Prior to the act of March 3, 1887, this was not an open question. It was well settled by several decisions of the Circuit Court, under the act of

> of March 3, 1875, and prior acts, that receivers of national banks, *being officers of the United States, could maintain such actions without regard to the citizenship of the parties or the amount involved in the suit.*"

Now, the complainant receiver herein is as much an officer of the court under and by virtue of the Constitution and laws of the United States as are the receivers of National banks; and this was plainly held by this court in *White* v. *Ewing*, in holding the cases of *Price* v. *Abbott*, and *Armstrong* v. *Trautman*, to be directly in point.

This is further shown by the decision of the court in *Texas and Pacific Railway* v. *Cox*, 145 U. S., 593. In that case the court say:

> "These receivers were appointed by the Circuit Court, and derived their powers and discharged their duties subject to its orders. These orders were entered, and all action of the court in the premises taken by virtue of judicial power possessed and exercised under the Constitution and laws of the United States."

And the court said of the suit there (a suit against the receiver):

> "As jurisdiction without leave is maintainable through the act of Congress, *and as the receivers became such by reason of, and derived their authority from, and operated the road in obedience to, the orders of the Circuit Court in the exercise of its judicial powers*, we hold that jurisdiction existed because the suit was one arising under the constitution and laws of the United States; and this is in harmony with previous decisions. *Buck* v. *Colbath*, 3 Wall., 334; *Feibelman* v. *Packard*, 109 U. S., 421; *Bock* v. *Perkins*, 139 U. S., 628."

Now, here the court squarely holds that the suit against

the receiver (Congress having taken away the requirement that authority therefor from the court should first be had) was one arising under the constitution and laws of the United States *because the receivers became such by reason of, and derived their authority from and operated the road in obedience to, the orders of the Circuit Court in the exercise of its judicial powers.* That is precisely this case. This suit by the receiver is precisely as much a suit arising under the constitution and laws of the United States, on that ground, as a suit against the receiver. We submit that the case of *Texas & Pacific Railway* v. *Cox*, is decisive of this question.

It will be observed that the court in that case (and in other cases cited below) cites as authority the cases of *Buck* v. *Colbath*, 3 Wall., 334; *Feibelman* v. *Packard*, 109 U. S., 421, and *Bock* v. *Perkins*, 139 U. S., 628, (which we shall refer to a little later), and so places receivers of the Federal courts in the same position in respect to jurisdiction as a United States marshal or other court officer.

Again, in the case of *McNulta* v. *Lochridge*, 141 U. S., 327, 330–31, the plaintiff in error, who was a receiver appointed by a Federal court, was sued in a court of the State of Illinois for the negligence of his predecessor in the same office of receiver. He sued out a writ of error from this court to the Supreme Court of Illinois under Section 709 of the Revised Statutes; and the defendant in error made a motion to dismiss on the ground of want of jurisdiction, and of that this court said:

> "We are authorized by Revised Statutes, Sec. 709, to review the final judgment or decree of a state court where 'any title, right, privilege or im-

> munity is claimed under * * * any * * * *authority* exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such * * * authority * * * ' etc. Now, as McNulta was exercising an authority as receiver under an order of the Federal court and claimed immunity as such receiver from suit without previous leave of such court, and the decision was adverse to such claim, he is entitled to a review of such ruling, whether his claim be founded upon the statute or upon principles of general jurisprudence. We regard this as a legitimate deduction from the opinions of this court in *Buck* v. *Colbath*, 3 Wall., 334; *Feibelman* v. *Packard*, 109 U. S., 421; *Pacific R. R. Removal Cases*, 115 U. S., 1; *Etheridge* v. *Sperry*, 130 U. S., 266; and *Bock* v. *Perkins*, 139 U. S., 628. The motion to dismiss must therefore be denied."

Section 709 of the Revised Statutes was passed by Congress in pursuance of that portion of section 2 of article III of the Constitution above referred to, which extends the judicial power of the United States to cases arising under the constitution or laws of the United States and treaties made under their authority, as distinct from cases where the jurisdiction depends upon diverse citizenship.

In *Tennessee* v. *Union & Planters' Bank*, 152 U. S., 454, 459, the court say:

> "The earliest Act of Congress which conferred on the Circuit Courts of the United States general jurisdiction of suits of a civil nature, at common law or in equity, 'arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority,' was the act of March 3, 1875, c. 137 (18 Stat., 470). Under section 1 of that act, providing that those courts should have original cognizance of such suits when the matter in

> dispute exceeded the sum of $500, their jurisdiction was exercised in cases in which the plaintiff's own statement of his cause of action showed that he relied on some right under the constitution or laws of the United States. *Feibelman* v. *Packard*, 109 U. S., 421; *Kansas Pacific Railroad* v. *Atchison, &c., R. R.*, 112 U. S., 414; *New Orleans* v. *Houston*, 119 U. S., 265; *Bacharach* v. *Norton*, 132 U. S., 337; *Cooke* v. *Avery*, 147 U. S., 375."

That is this case which was commenced under the judiciary act of March 3, 1875.

This court in several cases above cited held that a suit by or against a receiver of a federal court, upon this question that it is a suit arising under the constitution and laws of the United States, is governed by the authority of *Buck* v. *Colbath*, 3 Wall., 334; *Feibelman* v. *Packard*, 109 U. S., 421; *Bock* v. *Perkins*, 139 U. S., 628. Let us look at those cases:

In *Buck* v. *Colbath* it is held that a judgment imposed in a state court for trespass against a United States marshal, where he justified under a federal writ of attachment, presented a case for a writ of error under section 709 of the Revised Statutes. In that case the court, by Mr. Justice MILLER, say:

> "The defendant claimed the protection of 'an authority exercised under the United States,' and the decision was against the protection thus claimed; or, in other words, against the validity of that authority, as a protection to him in that action. Whether the authority which he thus set up was valid to protect him is a question for this court to decide finally, and is properly brought before us under the writ of error to the Supreme Court of Minnesota."

In *Feibelman* v. *Packard*, 109 U. S., 421, a suit was brought against a United States marshal on his bond,

for seizing goods under an order in bankruptcy, whi
seizure was alleged to have been wrongful, and the co
held that the suit was one of a civil nature arising un
the constitution and laws of the United States. T
case is parallel, in respect of this question, to the case
bar.

So in *Bock* v. *Perkins*, 129 U. S., 628, it was h
that a suit brought in a state court against a Unit
States Marshal could be removed by the marshal to t
United States Court "as one arising under the laws
the United States."

Clearly, under those cases, this suit is one arising u
der the laws of the United States.

In *Keihl* v. *City of South Bend*, 76 Fed. Rep., 9
in the Circuit Court of Appeals for the Ninth Circuit, t
receiver of a water company, appointed by a fede
court, brought suit against the city to recover money
leged to be due the company for rentals for use of h
drants; and the court held upon the question of jurisd
tion:

> "The subject-matter of the action, involving
> it does the acts and rights of the receiver of a fe
> eral court, constitutes a case arising under the la
> of the United States, and therefore was within t
> jurisdiction of the court below."

In *Jewett* v. *Whitcomb*, 69 Fed. Rep., 417, 418, t
court (SEAMAN, J.) said:

> "The defendants are sued, as receivers appoint
> by a United States court, for the conduct of the
> engaged in the operation of a railroad in the han
> of the court, committed to their charge as its office
> and subject to its exclusive direction and contr
> The liability with which they are charged is o
> arising wholly out of their management of the pro
> erty intrusted to them, and is incurred through th

appointment to and acceptance of the trust. Federal cognizance is conferred by these conditions irrespective of any question of citizenship or of any peculiarity to that jurisdiction, and the right of removal, therefore, follows as of course."

Cooke v. *Avery*, 147 U. S., 375, is conclusive of this question in our favor. In that case, which was an action of trespass to try title to land, it was held that where a plaintiff's title rests upon the validity of a lien claimed to have been acquired under a judgment of a Circuit Court of the United States, the disposition of the issue depends upon the laws of the United States and the rules of its courts, and a federal court has jurisdiction. In that case an action of trespass to try title to land was brought in the Federal Court; and the plaintiff claimed title from a common source with defendants, under an execution sale upon a judgment recovered against the common source in the Circuit Court for the Northern District of Texas; and the court, by Mr. Chief Justice FULLER said:

"Whether a suit is one which arises under the constitution and laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the constitution or a law of the United States or sustained by the opposite construction, then the case is one arising under the constitution or laws of the United States. * * * Plaintiff is to be regarded as the purchaser at the sale, and the validity of his purchase turned upon the existence of a lien, which he asserted and the defendants denied. *The disposition of this issue depended upon the laws of the United States and the rules of the Circuit Court, and their construction and application were directly involved. We are of opinion that jurisdiction as resting on the subject-matter was properly invoked.*" (147 U. S., 384–5, 390.)

So here in this suit, the validity of complainant's title depended upon his appointment as an officer of the Federal Court, under the laws of the United States, and the rules of that court; and their construction and application were directly involved.

By rule 90 of the equity rules which were adopted in 1842, in pursuance of the power conferred by the judiciary act and are therefore of the same effect as an act of Congress, it is provided that in all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the "present practice of the High Court of Chancery in England." And it is by virtue of this rule and law as by virtue of the constitution extending the judicial power to cases in equity, and the judiciary acts providing therefor, that receivers are appointed by Federal Courts of equity. The appointment of receivers took its origin in the English Court of Chancery. Upon this Mr. HIGH says:

> "The jurisdiction exercised in the appointment of receivers has always been treated as a purely equitable one, and the remedy has been generally regarded next to that by injunction, as the most efficient and salutary of the extraordinary remedies known to courts of equity. Finding its origin in the English Court of Chancery, it was, until the recent abolition of that court as a distinct tribunal, always regarded as one of its most efficient remedies, although granted with caution and only upon a satisfactory showing of the necessity for the interposition of the court." High on Receivers, Sec. 40.

So the right and title of this receiver and his cause of action, and the disposition of the issue herein, depend upon the laws of the United States and the rules of the court, as clearly as did the title of the complainant in *Cooke* v. *Avery*, *supra*.

In this case, as in *Cooke* v. *Avery*, the plaintiff's title rests upon the validity of the decretal order of the Circuit Court of the United States; and the bill here shows, as in *Cooke* v. *Avery*, that this was denied by the defendants; and here, as there, held, the disposition of the issue depends upon the laws of the United States and the rules of its courts, and the Federal court had jurisdiction on the ground that the case was one arising under the laws of the United States.

In *Morgan's Co.* v. *Texas Central Ry.*, 137 U. S., 171, 201, it was contended that the bill of complaint of the Farmer's Loan and Trust Company to foreclose its mortgage upon property of which the court had appointed a receiver, if treated as an original bill, could not be maintained, for want of jurisdiction—there not being the requisite diversity of citizenship. But the court held that *if that bill be regarded as an original bill, the jurisdiction of the Circuit Court did not depend upon the citizenship of the parties, but on the subject-matter of the litigation.* And as said in *Martin* v. *Hunter's Lessee*, and in *Cohens* v. *Virginia*, *supra*, jurisdiction dependent upon the subject-matter is based upon the first class of cases—those involving a federal question.

There is nothing in the point made by appellee's counsel that appellant in his bill alleged diverse citizenship. He also alleged that his title and case arose under Federal law.

In *Benjamin* v. *New Orleans*, 169 U. S., 161, 164, the court said that the sixth section of the Judiciary Act of March 3, 1891, which makes final the judgments or decrees of the Circuit Courts of Appeals in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and

citizens of the United States or citizens of different states, "refers to cases where no other distinct ground or jurisdiction is relied on." And in *Colorado Mining Co.* v. *Turck*, 150 U. S., 138–144, it was recognized that jurisdiction might be invoked on the ground of a Federal question, although the diverse citizenship were shown. So that here it is of no consequence if the complainant alleged and relied on diverse citizenship, if he also set up the jurisdiction upon another ground. Under section 6 of the Judiciary Act of March 3, 1891, the jurisdiction must depend *entirely* upon diverse citizenship. But jurisdiction here depends upon a Federal question.

IV.

The authorities cited by the appelleee in support of its motion to dismiss considered.

The case of *Carey* v. *Houston & Texas Railway*, 161 U. S., 115, is the only case that bears any resemblance to the case at bar; but that case is readily distinguishable. In that case certain persons as stockholders of the railway company filed a bill in the Circuit Court for the Eastern District of Texas against the railway company to impeach and vacate a certain decree of the Circuit Court entered in a certain consolidated foreclosure suit against the said railway company, of which the complainants were stockholders, *on the ground that the decree was entered through collusion and fraud.* There was no right, title or interest claimed by the complainants under or by virtue of any law of the United States. There was no federal question involved. The court found that there was no collusion or fraud. The complainant in the case attempted, by this indirect method

of filing a bill, to impeach the decree, and then appealing the same from the Circuit Court of Appeals to this court, to obtain a review by this court of questions which were foreclosed from such a review. In the first place, Carey appealed from the decree dismissing his bill of complaint, directly to this court, and sought therein to review the question of the jurisdiction of the Circuit Court in the original case in which the decree of foreclosure was entered. Upon very clear principles, that could only be done by an appeal from the decree in the foreclosure suit; and this court so held in *Carey* v. *Houston & Texas Railway*, 150 U. S., 170. Then Carey having taken a second appeal to the Circuit Court of Appeals from the decree dismissing his bill, where said decree was affirmed, prayed an appeal from the judgment of the Circuit Court of Appeals to this court. But plainly, here, too, the purpose of the appeal was, by this indirect method, to review in this court the decree in the foreclosure suit, which could not be reviewed in this court by any direct appeal. The gist of the decision of this court is contained in these words of the opinion, which are quoted from the opinion of the court in *Gregory* v. *Van Ee*, 160 U. S., 643, 646:

> "Manifestly the decree in the main suit cannot be revised through an appeal on ancillary or supplemental proceedings, thus accomplishing indirectly what could not be done directly."

As stated in the opinion of this court, the ground of jurisdiction of the Circuit Court to entertain a bill to set aside its own decree on the ground of fraud and collusion, was not a ground of federal jurisdiction, but of the exercise of the powers of courts of superior general jurisdiction.

That case is entirely unlike this case. Here the officer of a federal court, claiming title by virtue of his office under the laws of the United States and the rules of the court, files a bill in his own name as such officer, setting up this title and right and seeking to enforce it; and in his bill he alleges that the defendant denies his right and title as such officer and his right to maintain such suit. This case is, as we have stated, like the case of *Cooke* v. *Avery*, 147 U. S., 375, where the jurisdiction was sustained on the ground that a federal question did exist, and that the disposition of the issue as to the plaintiff's title depended upon the laws of the United States and the rules of its courts.

The case of *Gregory* v. *Van Ee*, 160 U. S., 643, was the case of an *intervention* in the same suit in which a decree of the Circuit Court of Appeals was made final by the sixth section of the judiciary act of March 3, 1891. The case of *Rouse* v. *Letcher* was another similar case of intervention; and in those cases it was held that as the decree of the Circuit Court of Appeals in the case is final, the decree upon an intervention in the same suit must be regarded as equally final "because the intervention is entertained in virtue of jurisdiction in the Circuit Court already subsisting." But the jurisdiction of the bill of the receiver in the case at bar was not "entertained in virtue of jurisdiction in the Circuit Court already subsisting" in the sense in which this language is used in the cases cited. Here the orders of the Circuit Court, in the case in which the receiver is appointed, are referred to merely as muniments of the title and right of the complainant receiver, as was the judgment of the Federal Court in *Cooke* v. *Avery*, 147 U. S., 375. It shows that the complain-

ant receiver was appointed an officer of the court. When appointed, he is as much an officer of the court as the clerk of the court or the marshal,and the order of his appointment is his muniment of title. It is settled that an attack in this case upon the validity of the orders appointing appellee receiver is a collateral attack. *Evers* v. *Watson*, 156 U. S., 533; *Cutler* v. *Huston*, 158 U. S., 428, 430; *Compton* v. *Jessup* (Cir. Ct. App., 6th Cir.), 68 Fed. Rep., 263, 282. The cases in which those orders were entered are not this case. The jurisdiction in those cases depends upon one ground; the jurisdiction in the case at bar on entirely separate grounds.

It is not because of the *jurisdiction* of the court in those cases that the jurisdiction here exists. Jurisdiction here exists because an officer of the court claims title under, and basing his right upon the laws of the United States and the rules of the Federal Court. *Cooke* v. *Avery* applies, but not the intervention cases cited by appellee.

The case of *Pacific Railroad* v. *Missouri Pacific Ry.*, 111 U. S., 505, 522, cited by counsel for appellee, has no application. That suit was a bill filed to impeach a decree of foreclosure for fraud, like the bill of Carey in *Carey* v. *Houston & Texas Ry.*, and the question was whether the Circuit Court which entered the decree which was attacked had jurisdiction of the case without regard to the citizenship of the parties. And the court held that:

> " there can be no doubt that the Circuit Court, as the court which made the Ketcham decree, * * * has jurisdiction to entertain the present suit to set aside that decree on the grounds alleged in the bill, if they shall be established as facts, and if there shall be no valid defense to the suit, although the

> plaintiff and some of the defendants are citizens of Missouri."

That case has no sort of application to the case of an original bill of complaint filed by a receiver of a federal court.

The case of *Borgmeyer* v. *Idler*, 159 U. S., 408, cited by the counsel for appellee, is also clearly distinguishable. In that case the court held that when the jurisdiction of a Circuit Court of the United States is invoked upon the ground that determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character of which the Circuit Court could properly take cognizance at the time its jurisdiction was invoked. In the case at bar that does appear, at the outset, from the pleadings. The fact that the right and title of the complainant was that of an officer of the court derived under the laws of the United States, appeared upon the face and at the beginning of the bill of complaint herein as we have shown. (Print. Rec., pp. 1, 23, 24.)

In the case of *Press Publishing Co.* v. *Monroe*, 164 U. S., 105, cited by appellee, the court said:

> "The plaintiff, in her complaint, did not claim any right under the constitution and laws of the United States, or in any way mention or refer to that constitution or those laws; and, at the trial, she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who invoked the constitution and laws of the United States."

And for this reason the court very properly held that the case was not one "arising under the constitution or laws of the United States." The case must arise upon

the complainant's case and not upon the defendant's. That case does not apply.

The contention of appellee's counsel that the receiver here recovers in the right of his corporation is incorrect.

This receiver, appointed at the suit of creditors, takes not merely title of the corporation of which he is receiver. He may recover, where the corporation itself, if it had sued, might be barred. He takes an independent and different title. *Pittsburgh Carbon Co.* v. *McMillan*, 119 N. Y., 46; *Curtis* v. *Leavitt*, 15 N. Y., 9, 108; *Porter* v. *Williams*, 9 N. Y., 142; *Gillet* v. *Moody*, 3 N. Y., 479; Beach, Receivers, Sec. 671; *White* v. *Ewing*, *supra*.

But the receiver acquires his appointment and his right and title under and by virtue of his appointment and the laws of the United States and the rules of the Federal Court.

V.

The contentions of the counsel for appellee that no federal question was involved upon the bill in this case; and that the appellant asserted no right under the constitution and laws of the United States, are incorrect.

By the very assertion of the bill that the complainant was appointed receiver, and was an officer of the federal court, and that the courts of his appointment authorized and directed him to bring suit as such receiver and officer, was an assertion of a right under the laws of the United States. These were set up in the bill as first filed (Print. Rec., 1, 2, 3), and again in the amended

bill (*id.*, 23-24), and the complainant alleged that he had given due notice of his appointment as receiver to said defendants, and had demanded that they should deliver and return to him the property and effects of the Chicago & South Atlantic Railroad Company, but said demand was rejected, and that they still hold said property without right. (*Id.*, 42.) And by the further amendment to said bill, as we have shown, it is alleged that the defendants contended that complainant as such receiver was never given any power, by the order appointing him, to sue in his own name for the cause of action set forth in the bill; of which the complainant charged the contrary, and the complainant charged that the order was and was to be taken as valid, binding and effectual, and that the complainant was authorized by the order of the court to bring the suit herein in manner and form as done. (*Id.*, 122.) And these amendments are to be taken when filed, as if filed at the beginning of the suit.

VI.

The ground of the jurisdiction of this suit by the Receiver is not the ground of jurisdiction of the suits in which the Receiver was appointed.

This position is not controverted by saying that if the court appointing the receiver had no jurisdiction or power to appoint him, then this suit by the receiver could not be maintained. That merely means that he is not a receiver of a Federal Court. It would merely mean that his appointment is void. It would merely mean that his muniment of title was not a valid one. So in the case of *Cooke* v. *Avery*, 147 U. S., 375, if the Federal

Court in which the judgment was entered, through the lien of which the plaintiff's title was deraigned, had no jurisdiction to enter said judgment, then there would have been no lien; and that muniment of the plaintiff's title would have been invalid. But the jurisdiction of the Federal Court in *Cooke* v. *Avery*, on the ground that a federal question was involved, did not depend upon, was not the same as the jurisdiction of the Federal Court in the case in which the said judgment was entered. This case is in that respect similar to *Cooke* v. *Avery*.

It does not answer this point for appellee's counsel to assert that the jurisdiction in this suit by the receiver is "ancillary." The word "ancillary" is a word of very wide and varied meaning. It does not necessarily mean that the jurisdiction of the court in an ancillary suit is identical with or the same as the jurisdiction of the suit to which it is ancillary in the sense contended by appellee. It *includes* such cases in which the jurisdiction is the same. Interventions like *Gregory* v. *Van Ee* and *Rouse* v. *Letcher*, and suits to impeach the decree of the same court in which the suit is brought, are such suits. The word "ancillary" is applied to proceedings where the jurisdiction is not the same. For instance, where administration of assets is granted in a state or country other than that in which the deceased person was domiciled, after the granting of letters in the state of his domicile, such second administration is an ancillary administration. But the jurisdiction of the court in the latter case depends upon the laws of that state or country, and not upon the laws of the state or country in which the original administration was had. (See Standard Dictionary, title "ancillary.") So the case of *Cooke* v. *Avery*

was ancillary to the suit in which the judgment was entered, through the lien of which the plaintiff claimed title.

NOTE: Counsel for appellee has printed what purports to be the "pleadings, decree, opinion of Court of Appeals, etc., for use on motion to dismiss appeal, with page reference to certified transcript on file in this court." This short transcript does not contain all of the pleadings. It omits amendments to the bill filed by leave of court. (Pr. Tr., 118–31.) It omits the pleadings on behalf of defendants. It omits the master's report, which contains the findings of fact as approved and confirmed by the final decree. The appellant, however, heretofore filed in this court fifteen copies of the printed transcript of record as filed in the Circuit Court of Appeals, together with printed copies of the supplemental record of proceedings in the Circuit Court of Appeals, of which copies nine copies of each for the use of the justices are still with the court, and we assume are available for the purposes of this motion. We have, therefore, in this brief, referred to the pages of the printed record as printed for the Circuit Court of Appeals. And we have inserted in this brief therefrom certain portions of said record which were omitted from the short transcript filed by appellee, when we deemed these portions essential or important on this motion. And if it is deemed more convenient for the court that all the portions of the record which are thought by counsel to be important on this motion should be included in the short transcript, counsel for appellant will confer with counsel for appellee, and the counsel will speedily supply the same.

Respectfully submitted.

JOHN S. MILLER,
For Appellant.